



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 24, 1992

Mr. Dan La Fleur
Office of General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-7111

OR92-112

Dear Mr. La Fleur:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 12650.

You received a request for "documents relating to the management of Texas Electric Cooperatives and of PCB and any solid waste in Travis and Bastrop Counties." You wish to withhold an inspection report for Travis County which the Department prepared for the Environmental Protection Agency (EPA). You state as follows:

The EPA has requested that the Department not release the report because the EPA is contemplating possible administrative action or litigation based on the inspection report. The Department may be a party in any such action or litigation since Department personnel prepared the inspection report.

You ask whether the inspection report is confidential under section 3(a)(3) of the Open Records Act, which permits you to withhold

information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence

of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection

V.T.C.S. art. 6252-17a, § 3(a)(3).

You have also sent us a copy of a complaint and notice of opportunity for hearing that the EPA has filed in an administrative action against Texas Electric Cooperatives, Inc., pursuant to section 16 of the Toxic Substances Control Act, 15 U.S.C. § 2615. The Department of Health is not identified as a party in this complaint.

For section 3(a)(3) to apply, litigation to which the state is a party must be pending or reasonably anticipated. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.-Houston [1st Dist.] 1984, writ ref'd n.r.e.), Open Records Decision No. 351 (1982). You have not explained why the fact that the Department of Health prepared the investigation report might result in its becoming a party to litigation brought by the EPA, nor does any information in the file suggest that EPA will bring the Department of Health into a lawsuit based on this report. We are unable to conclude that the information relates to "reasonably anticipated" litigation to which the state is a party. Accordingly, you may not withhold it pursuant to section 3(a)(3), and you must release it to the requestor.

We note, however, that the EPA complaint states in paragraph 10 of the Preliminary Statement that an inspection was made by a representative of the Texas Department of Health, acting for the EPA pursuant to section 2610 of title 15, U.S.C. That provision allows the administrator of the EPA or any duly designated representative of the administrator to inspect certain premises in which chemical substances are manufactured, processed, stored or held. It is possible that the Department of Health holds these records as agent for the EPA, and not in its own right, so that the Department of Health is not the custodian of the records for purposes of requesting them under public information laws. *See generally* Open Records Decision No. 576 (1990). We do not have sufficient information about the process whereby an employee of the department is designated representative of the administrator to resolve this question. However, if you can demonstrate that the department is not the custodian, please inform us of your arguments within 10 days of the receipt of this letter.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR92-112.

Yours very truly,



Susan Garrison
Assistant Attorney General
Opinion Committee

SG/nhb

Ref.: ID# 12650

Enclosure: Open Records Decision Nos. 351, 576

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